Order Clarifying Expert Discovery Order And Modifying Expert Discovery Schedule

08/13/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION, _____ This document relates to all actions	MDL NO. 1407 ORDER CLARIFYING EXPERT DISCOVERY ORDER AND MODIFYING EXPERT DISCOVERY SCHEDULE

I. INTRODUCTION

THIS MATTER comes before the court on Plaintiffs' Agreed Upon Motion to Clarify Court's Order re: Expert Disclosures and Disputed Motion to Modify Court's Order re: Expert Schedule ("Plaintiffs' Motions"). Having reviewed pleadings filed in support of and in opposition to the motions, along with the remainder of the record, and, being fully advised, the court finds and concludes as follows:

II. BACKGROUND

In a February 27, 2002 status conference, the parties presented their differing positions concerning expert discovery. Defendants advocated that the court conduct general causation expert discovery, including consideration of causation evidence in relation to so-called "sub-populations." The defendants asserted that the Yale Hemorrhagic Stroke Project ("HSP") found a "suggestion of an association" between PPA consumption and injury for a defined sub-population: women aged eighteen to forty-nine with respect to "first use" of PPA. See Defendants' Memorandum Regarding Proposed Expert Discovery Schedule ("Defendants' Memorandum"), at 5. According to defendants, what the court should also determine was whether there existed any association between PPA and injuries sustained in other age and gender groups. Plaintiffs argued against the MDL court conducting any expert discovery. They alternatively argued that, should the court nonetheless allow expert discovery on general causation, that discovery should be limited to the question of whether PPA is capable of causing injury. They objected to consideration of the

evidence in relation to sub-populations, which they argued would constitute an inquiry into specific causation.
The court ordered expert discovery on general causation, but did not specify what it would hear with respect to sub-populations. The court then issued an expert discovery schedule on March 22, 2002. The parties now seek clarification as to the scope of general causation expert discovery anticipated by the court. Plaintiffs also seek a modification of the expert discovery schedule.

III. DISCUSSION

A. Motion to Clarify Court's Expert Disclosures Order

Plaintiffs ask that the court clarify the March 22, 2002 expert discovery order to indicate that the parties need only disclose experts addressing "generic" or "general" issues of causation and liability, but not "case-specific experts" addressing the specific causation, liability, and damages issues in a given case. See Plaintiffs' Motions, at 1. They further request that the court clarify that case-specific experts would be disclosed only upon remand, subject to discovery in and according to the rules of the remand court. Id. at 1-2. Defendants agree to a clarification that the order relates only to experts with opinions addressing issues of general applicability. The parties also agree that this evidence would relate to any and all of the injuries alleged by plaintiffs. The parties again disagree as to the parameters of the general causation inquiry as it relates to various sub-populations. Defendants argue that plaintiffs must come forward with any expert evidence supporting a conclusion that PPA is capable of causing injury in any significant sub-population, i.e. men and age groups falling outside of the eighteen to forty-nine year old age range. Plaintiffs reject this interpretation of their general causation burden and, in support, point to a recent Ninth Circuit decision in which the court held as follows:

> General, or 'generic' causation has been defined by courts to mean whether the substance at issue had the capacity to cause the harm alleged, while 'individual causation' refers to whether a particular individual suffers from a particular ailment as a result of exposure to a substance.
> . . . .
>
> Defendants have not cited a case that articulates a

> contrary understanding of generic causation. Given this authority, we believe the appropriate understanding of generic causation is the one plaintiffs assert: whether exposure to a substance for which defendant is responsible, such as radiation at the level of exposure alleged by plaintiffs, is capable of causing a particular injury or condition *in the general population*.

In re Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1133 (9th Cir. 2002) (emphasis added). Plaintiffs assert that the scope of the general causation inquiry is, thus, limited to the question of whether PPA is capable of causing the injuries alleged in the "general population."

Plaintiffs accurately point to the widely accepted definitions of general and specific causation. See, e.g., Hanford Nuclear Reservation Litig., 292 F.3d at 1133; Grant v. Bristol-Myers Squibb, 97 F. Supp. 2d 986, 989 (D. Ariz. 2000); In re Breast Implant Litig., 11 F. Supp. 2d 1217, 1224 (D. Colo. 1998). However, plaintiffs misconstrue these definitions as they apply in this case.

As noted above, the court ordered expert discovery on the topic of general causation and scheduled Daubert hearings to follow the completion of that discovery. Pursuant to Daubert, the court is obliged to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).[11] See also Fed. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.") This inquiry is "a flexible one." Id. at 594. "Its overarching subject is the scientific validity–and thus the evidentiary relevance and reliability–of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." Id. at 594-95.

The general causation inquiry before this court concerns the question of whether PPA is capable of causing the injuries alleged by plaintiffs. Consideration of alleged limitations of the evidence offered, such as the HSP's alleged inapplicability to certain sub-populations, would not transform this inquiry into one of specific

causation. Instead, these considerations would occur in the context of the Daubert reliability and relevance analysis conducted by the court.

Moreover, consideration of the evidence as it relates to significant sub-populations would serve the very purpose behind the creation of the MDL. As an MDL court, this court possesses an interest in eliminating duplicative discovery, preventing inconsistent pretrial rulings, and conserving resources. While consideration of the evidence in relation to significant sub-populations would not implicate each and every individual PPA case, these considerations do constitute issues of general applicability given their relevance to large numbers of those cases. See, e.g., Defendants' Memorandum, at 7 (asserting that approximately one-third of pending personal injury cases have been brought by men). As such, a thorough examination of the general causation evidence pursuant to Daubert would further the goals of this court and the MDL as a whole.

Like the court in In re Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2001 U.S. Dist. LEXIS 5927, at *12 (E.D. Pa. May 9, 2001), the court here describes the generic experts expected to appear in this case as "persons who would testify for a party regarding general causation issues of widespread applicability" and with opinions pertaining "to the history, science and other issues of causation relating to [PPA]."[22] In fact, in Diet Drugs Prods. Liab. Litig., the court authorized both general and specific phases of expert discovery, requiring Rule 26 disclosures for all case-specific experts, including treating physicians in individual cases. 2001 U.S. Dist. LEXIS 5927, at *13. Given that the court deems causation with respect to significant sub-populations to constitute issues of widespread applicability, expert discovery should address those issues at this stage of the proceedings. The court will not, however, consider expert evidence on the question of specific causation; that is, evidence as to whether a particular individual suffered an injury based on consumption of PPA.

In sum, the court clarifies its prior ruling as follows: expert discovery encompasses all issues of widespread applicability, including general causation evidence associated with significant sub-populations. At this time, the court requires further clarification as to what sub-population groups will be the subject of expert evidence. The parties shall confer as to an appropriate breakdown of the evidence into sub-groups and shall submit their agreed suggestions within ten (10) days from the date of this

order. If the parties are unable to reach an agreement on this issue, they shall submit their respective suggestions, along with a supporting rationale totaling no more than five (5) pages. The court will thereafter issue an order articulating the parameters of the expert discovery as it relates to significant sub-populations.

B. Motion to Modify Court's Expert Schedule

Plaintiffs also request a modification to the expert discovery schedule. They note that all plaintiffs will be obligated to disclose their general causation experts on October 1, 2002, as each plaintiff has the right to develop his or her own expert regardless of the MDL consolidation. As such, individual plaintiffs' lawyers may or may not adopt the experts identified by the MDL Plaintiffs' Steering Committee ("PSC"). Plaintiffs request that the court allow individual MDL plaintiffs' attorneys a two-week period following the initial disclosure date in which to review the PSC's Rule 26 disclosures and decide whether to formally adopt those experts for their individual cases. They argue that this modification will serve judicial economy and benefit defendants by reducing the total number of experts involved in these proceedings.

The court agrees that an opt-in period would assist in reducing the number of experts involved in the MDL proceedings. As such, the court hereby modifies the expert discovery schedule to provide for a two-week opt-in period for individual plaintiffs' attorneys. While the PSC must abide by the October 1, 2002 disclosure deadline, individual plaintiffs' attorneys must either indicate their acceptance of the PSC experts or file their own disclosures by October 15, 2002.

IV. CONCLUSION

For the reasons stated, the court hereby clarifies that the expert discovery order issued by this court requires expert discovery relating to all issues of widespread applicability, including general causation evidence associated with significant sub-populations. The court orders the parties to abide by the schedule as provided for in this order in submitting suggestions as to the appropriate parameters for the sub-population evidence. The court also modifies the expert discovery schedule as described above.

DATED at Seattle, Washington this 13th day of August, 2002.

/s/

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE